U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of KIMBERLY EVANS and U.S. POSTAL SERVICE,
POST OFFICE, Columbus, OH

Docket No. 02-1473; Submitted on the Record;
Issued September 3, 2003

DECISION and ORDER

Before ALEC J. KOROMILAS, COLLEEN DUFFY KIKO,
DAVID S. GERSON

The issue is whether the Office of Workers' Compensation Programs properly reduced appellant's compensation for wage loss to zero, pursuant to 5 U.S.C. § 8113(b), for failure to participate in good faith in a vocational rehabilitation program.

On December 7, 1999 appellant, then a 39-year-old casual clerk, sustained a traumatic injury at work, when her left hand was caught and smashed between two pie carts. The Office accepted her claim for left hand contusion, left wrist sprain and reflex sympathetic dystrophy (RSD) of the left hand and wrist.

The employing establishment terminated employment due to appellant's inability to perform the duties of her position. She notified the Office that she worked as a sales clerk with a private employer from September 21, 2000 through January 12, 2001 earning $9.00 an hour.[1]

On August 3, 2001 the Office advised appellant as follows:

> "The Office will soon assign a registered nurse (RN) to help you recover from your work-related injury and assist in your return to work. The RN will contact you directly to arrange a convenient time to meet.
>
> "The RN will not be involved in your direct care. Rather, the RN will first talk over your medical care with you, your doctor, your employer and this office and will then help you resolve any problems which have arisen.
>
> "We have two aims in assigning the RN. The first is to ensure that you receive the right kind of medical care, in a timely fashion, to help you recover. The second is to ensure that you return to work or your progress from a light duty to a

[1] She earned $11.00 an hour in her date-of-injury job.

full[-]duty job, goes smoothly and that your attending physician and your [employing establishment] are aware of your medical and work situations.

"We regret that you suffered an injury and hope that the RN can help you recover. If you have any questions or concerns, please contact our office's staff nurse by [tele]phone…."

The Office referred the case to a staff nurse on August 14, 2001. Issues to be resolved included the following: "(1) Monitor the claimant's treatment and progress of her RSD. (2) When will the claimant be medically capable of performing some type of work? (3) Does the claimant have any restrictions with respect to her left wrist/hand? (4) Voc[ational] Rehab[ilitation]???"

Reports from the RN indicated that she left a message for appellant on August 31 and September 10, 2001 and wrote a letter to her on September 13, 2001. Appellant left messages with the RN on September 20, 2001 and they talked the following day. On September 21, 2001 the Office advised appellant that failure to return telephone calls in a timely fashion and failure to keep the nurse updated on her medical condition would not be tolerated. The Office apprised appellant of 5 U.S.C. § 8113(b) and explained that if she did not undergo vocational rehabilitation as directed, including nurse services and that if the Office found that her wage-earning capacity likely would have increased a great deal, the Office might reduce her compensation based on what she probably would have earned had she undergone nurse intervention and/or vocation rehabilitation.

The RN left a message with appellant on September 28, 2001 to set up an initial evaluation meeting. Appellant wrote to the Office that day to clarify her communication with the RN. Although the Office's September 21, 2001 letter stated that a new nurse would not be assigned, appellant understood the opposite and hoped that the new nurse would have compassion and would help her get better. She also hoped that she and the Office could resolve this problem. Appellant stated that she would be pleased to participate in the "rehabilitation of getting better."

On October 9, 2001 the RN reported that she had just spoken with appellant by telephone and that appellant would not agree to meet without first speaking with the Office claims examiner. Appellant apparently accused the RN of being nosey and hung up on her.

On October 12, 2001 the RN sent the Office an electromyography examination obtained on August 17, 2001 and reported that she had again spoken with appellant. Appellant called that day to apologize, explaining that she did not understand what the RN was supposed to do.

On November 9, 2001 the RN reported that, despite several cordial conversations, appellant did not respond to four recent messages. Also, the RN authorized a magnetic resonance imaging (MRI) scan, but appellant rescheduled it from November 14 to November 19, 2001. The RN advised the Office that her nursing assignment had only 32 days left, which left little time to accomplish anything.

Appellant underwent the MRI examination on November 14, 2001 as originally scheduled. It appears that the physician sent a facsimile of his report to the RN on November 15, 2001, who in turn sent a facsimile to the Office on November 20, 2001.

In a decision dated November 19, 2001, the Office reduced appellant's compensation for wage loss to zero under 5 U.S.C. § 8113(b). The Office stated that, unless appellant produced evidence to the contrary, it would assume that nurse intervention would have resulted in a return to work with no loss of wage-earning capacity. The Office explained that the reduction would continue until appellant complied in good faith with its directions concerning nursing services.

On December 1, 2001 appellant requested reconsideration. She stated that she lived with several family members and that, if the RN called, she was unaware of it. Appellant submitted telephone records to support that she talked with the RN on a regular basis.

The Office attempted to call appellant on February 25, 2002: "A gentleman answered the telephone. I asked whether the claimant was present. I was told simply 'no' and the individual hung up on me."

In a decision dated February 26, 2002, the Office reviewed the merits of appellant's claim and denied modification of its prior decision, finding that appellant failed to establish that she had, in fact, cooperated with the nurse program. The Office noted that the telephone records appellant submitted showed only that she had called the Office, not the RN. The Office noted that noncooperation was apparent through the lack of communication between appellant and the RN and that appellant had rescheduled appointments and testing without notifying the RN or providing reasons: "This also demonstrated noncooperation with the program." Although appellant alleged that she did not receive several messages left by the RN and although someone hung up on the Office, when it tried to call appellant on February 25, 2002, the Office found that appellant failed to demonstrate that she had initiated any contact with the RN or made any attempt to improve communication.

The Board finds that the Office improperly invoked the penalty provision of 5 U.S.C. § 8113(b).

Section 8104(a) of the Federal Employees' Compensation Act pertains to vocational rehabilitation and provides: "The Secretary of Labor may direct a permanently disabled individual whose disability is compensable under this subchapter to undergo vocational rehabilitation. The Secretary shall provide for furnishing the vocational rehabilitation services."[2] Under this section of the Act, the Office has developed procedures by which, an emphasis is placed on returning partially disabled employees to suitable employment and/or determining their wage-earning capacity.[3] If it is determined that the injured employee is prevented from returning to the date-of-injury job, vocational rehabilitation services may be provided to assist

[2] 5 U.S.C. § 8104(a).

[3] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Vocational Rehabilitation Services*, Chapter 2.813.2 (December 1993).

returning the employee to suitable employment.[4] Such efforts will be initially directed at returning the partially disabled employee with the employing establishment.[5] Where reemployment at the employing establishment is not possible, the Office will assist the claimant to find work with a new employer and sponsor necessary vocational training.[6]

The Act further provides at section 8113(b): "If an individual without good cause, fails to apply for and undergo vocational rehabilitation, when so directed under section 8104" the Office, after finding that in the absence of the failure the wage-earning capacity of the individual would probably have substantially increased, "may reduce prospectively the monetary compensation of the individual in accordance with what would probably have been [her] wage-earning capacity in the absence of the failure, until the individual in good faith complies" with the direction of the Office.[7] Under this section of the Act, an employee's failure to cooperate willingly with vocational rehabilitation may form the basis for termination of the rehabilitation program and the reduction of monetary compensation.[8] In this regard, the Office's implementing federal regulations state:

> "If an employee without good cause fails or refuses to apply for, undergo, participate in or continue to participate in a vocational rehabilitation effort, when so directed, [the Office] will act as follows:
>
> > '(a) Where a suitable job has been identified, [the Office] will reduce the employee's future monetary compensation based on the amount which would likely have been his or her wage-earning capacity had he or she undergone vocational rehabilitation. [The Office] will determine this amount in accordance with the job identified through the vocational rehabilitation planning process, which includes meetings with the [Office] nurse and the employer. The reduction will remain in effect until such time as the employee acts in good faith to comply with the direction of [the Office].
> >
> > '(b) Where a suitable job has not been identified, because the failure or refusal occurred in the early, but necessary stages of a vocational

[4] *Id*. The Office's regulations provide: "In determining what constitutes 'suitable work' for a particular disabled employee, [the Office] considers the employee's current physical limitations, whether the work is available within the employee's demonstrated commuting area, the employee's qualifications to perform such work and other relevant factors." 20 C.F.R. § 10.500(b) (1999).

[5] *See supra* note 3 at Chapter 2.813.3. The Office's regulations provide: "The term 'return to work' as used in this subpart is not limited to returning to work at the employee's normal worksite or usual position, but may include returning to work at other locations and in other positions. In general, the employer should make all reasonable efforts to place the employee in his or her former or an equivalent position, in accordance with 5 U.S.C. § 8151(b)(2), if the employee has fully recovered after one year." 20 C.F.R. § 10.505 (1999).

[6] *See supra* note 3 at Chapter 2.813.3.

[7] 5 U.S.C. § 8113(b).

[8] *See Wayne E. Boyd*, 49 ECAB 202 (1997) (the employee failed to cooperate with the early and necessary stage of developing a training program).

> rehabilitation effort (that is, meetings with the [Office] nurse, interviews, testing, counseling, functional capacity evaluations and work evaluations), [the Office] cannot determine what would have been the employee's wage-earning capacity.
>
> '(c) Under the circumstances identified in paragraph (b) of this section, in the absence of evidence to the contrary, [the Office] will assume that the vocational rehabilitation effort would have resulted in a return to work with no loss of wage-earning capacity and [the Office] will reduce the employee's monetary compensation accordingly (that is, to zero). This reduction will remain in effect until such time as the employee acts in good faith to comply with the directions of [the Office].'"[9]

The Office's reduction of appellant's compensation to zero under section 8113(b) of the Act is based on the presumption that the assignment of a staff nurse in this case constituted part of a vocational rehabilitation effort. The record, however, does not support such a presumption. There is no evidence that, upon receipt of evidence appellant worked as a sales clerk with a private employer from September 21, 2000 through January 12, 2001, the Office developed a vocational rehabilitation plan. The Office never referred appellant to a rehabilitation specialist for vocational rehabilitation services,[10] nor did it make even a limited referral for placement with the previous employer.[11]

Rather, the Office referred appellant to a staff nurse with questions to be resolved. One of these questions, whether appellant's case would benefit from vocational rehabilitation, demonstrates that the assignment of a staff nurse can stand independent of vocational rehabilitation. While regulations indicate that vocational rehabilitation services include assistance from registered nurses working under the direction of the Office, nurse services and vocational rehabilitation services are not one in the same. Office procedures explain that usually vocational rehabilitation services do not begin until nurse services end, though it may be important to begin vocational counseling during the period of nurse intervention. The nurse assigned to the case is responsible for identifying cases that may benefit from vocational services. He or she should communicate this recommendation to the claims examiner involved in the case.[12] There is no evidence here that the RN identified appellant's case as one that might benefit from vocational rehabilitation services and there is no evidence that she ever communicated such a recommendation to the claims examiner.

[9] 20 C.F.R. § 10.519 (1999).

[10] *See supra* note 3 at Chapter 2.600.7.a (November 1996) (criteria and procedures for referring cases for vocational rehabilitation services).

[11] *Id*. at Chapter 2.813.5.c (Reemployment: Vocational Rehabilitation Services).

[12] *Id*. at Chapter 3.201.4.b (April 1993) (Staff Nurse Services).

As the record fails to establish that the Office directed appellant to undergo vocational rehabilitation, neither section 8113(b) of the Act nor section 10.519 of the implementing regulations justifies the reduction of appellant's compensation.[13]

Further, the record in this case casts doubt on the Office's finding that appellant was noncooperative at the time of the reduction of compensation. When appellant accused the RN of being nosey and hung up on her on October 9, 2001 noncooperation was apparent but was triggered, perhaps, by a misunderstanding.[14] By October 12, 2001 circumstances appeared to change. Appellant had a chance to speak with the claims examiner and she called the RN that day to apologize for her actions. Subsequently, the RN reported that appellant failed to return four telephone messages and had rescheduled an MRI scan without notice or explanation. Appellant explained that she did not receive several calls from the RN, and there is some evidence this may be true. On February 25, 2002 the Office attempted to call appellant, but man answered. When the Office asked whether appellant was present, the man said "no" and hung up. The incident lends credence to appellant's assertion that she did not receive some calls. Also, while it may be true that appellant rescheduled the MRI scan from November 14 to November 19, 2001, the Office has not shown how this constitutes noncooperation. As it turned out, the examination took place on November 14, 2001 as originally scheduled, which, if appellant rescheduled it a second time to accommodate the nurse or the Office, would signal an intent to cooperate. No other circumstance after the October 12, 2001 apology justifies the Office's reduction of compensation on November 19, 2001.

Once the Office accepts a claim, it has the burden of proof to justify termination or modification of compensation benefits.[15] The Office failed to meet its burden of proof in this case.

[13] *Cf. Rebecca L. Eckert*, Docket No. 01-2026 (issued November 7, 2002) (failure to report to work after a limited-duty position was secured for the claimant was neither a failure to cooperate with vocational rehabilitation, nor a failure to cooperate with field nurse services).

[14] Appellant seemed to think that the Office was in the process of assigning a new nurse.

[15] *Harold S. McGough*, 36 ECAB 332 (1984).

The February 26, 2002 and November 19, 2001 decisions of the Office of Workers' Compensation Programs are reversed.

Dated, Washington, DC
September 3, 2003

Alec J. Koromilas
Chairman

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member